

FCC MAIL SECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 98M-2

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In Matter of) WT DOCKET NO. 94-147
DISPATCHED BY)
JAMES A. KAY, JR.)
)
Licensee of one hundred fifty two)
Part 90 licenses in the)
Los Angeles, California area.)

O R D E R

Issued: January 9, 1998

Released: January 13, 1998

This is a ruling on miscellaneous procedural matters which have recently been brought to the attention of the Presiding Judge through Status Reports filed by the parties on January 6, 1998, and the Bureau's Modification of List of Contemplated Witnesses that was filed on April 8, 1998. There are also matters of compliance with the Commission's Rules with regard to requesting subpoenas that require comment.

Depositions are being set for late January and early February. No mention was made of a schedule to depose experts and that subject should be addressed by counsel as soon as possible. In the Status Report of James A. Kay, Jr. ("Kay"), counsel for Kay has suggested a Status Conference on or before January 16, 1998, to address: (a) the narrowing of the Bureau's list of potential witnesses; (b) a specification of the issues in the designation order to which the identified Commission employees are expected to testify at hearing; (c) any matters charged in the HDO as to which the Bureau intends to offer no proof.

On January 8, 1998, the Wireless Telecommunications Bureau ("Bureau") filed a Modification of List of Contemplated Witnesses in which it removes from its witness list the name of Ben Nakamiyo who has recently retired from government service. Kay's counsel have indicated that if the Bureau decided not to use Mr. Nakamiyo as a witness there would be no need for his deposition. There are now only two Commission employees to be deposed, Paul Oei and James Lafontaine. The Bureau also advises that it is adding Craig Sobel to its list of witnesses. Mr. Sobel was responsible for writing the computer program that was used for preparing the loading records that were produced in discovery.

The Bureau has provided sufficient information in its list of witnesses and descriptions of relevance of testimony which it served on Kay at the direction of the Presiding Judge on October 24, 1997. The latest witness to be added, Mr. Sobel, has similarly been adequately described.

There will be nothing further required of the Bureau at this stage of discovery. All counsel should be focusing on the next round of depositions. Therefore, unless counsel for both parties show a need for the utility of a Status Conference, none will be held until after depositions are completed.¹

After Kay's counsel had submitted the subpoenas and notices for the depositions of Christopher Killian and Frank Barnett, the Presiding Judge required the submission of a request for the issuance of subpoena duces tecum ("Request") before acting on the subpoenas. See 47 C.F.R. §1.333(a)(b) (off-the-record requests for subpoenas shall be submitted in writing, shall be verified, and shall specify the documents and facts expected to be proved). Kay noted in the next day's Request that:

Despite the fact that formal written requests for the issuance of subpoenas were not required by the Presiding Judge for the depositions conducted by the parties in mid-December, 1997, Kay's counsel was directed by the Presiding Judge to submit this request pursuant to Section 1.333 of the Commission's Rules.

There is discretion for the Presiding Judge to control the conduct of discovery. Discovery Procedures, 11 F.C.C. 2d 185, 187 (1968). The Presiding Judge is also authorized to act on questions on his own motion. 47 C.F.R. §0.341(2)(b). In mid-December 1997, the Presiding Judge was monitoring the scheduling of the December depositions. Either through an oversight or because of the sufficiency of the information being provided at that time by counsel, the need for a written request may have been waived. However, counsel should not assume that an ad hoc utilization procedure of last December excuses for all time compliance with the Commission Rules on subpoenas. Compliance is necessary so that the Presiding Judge can act in an informed manner.²

¹ Counsel are filing monthly status reports which are of assistance in keeping the Presiding Judge advised of progress.

² It is also noted that the Request was not accompanied by the required verification. 47 C.F.R. §1.333(b). Because of the perceived need to act promptly and as an accommodation to counsel, the requirement of verification was waived. However, in the future, counsel or the party must verify the request for purposes of conforming with the Rule. Subpoenas are significant government writs and minimum care must be taken to assure that there are no abuses in their issuance.

It would also help to facilitate the process for everyone involved if counsel would advise the Presiding Judge's office in advance by telephone that a subpoena was being requested rather than send subpoenas unannounced for signature.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION³

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is fluid and cursive, with the first name "Richard" being more prominent.

Richard L. Sippel
Administrative Law Judge

³ Courtesy copies of this Order were faxed or e-mailed to counsel on date of issuance.